

Indiana ENERGY Association

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Boonville Natural Gas Corp.

Citizens Energy Group

Community Natural Gas Co., Inc.

Duke Energy

Fountaintown Gas Co., Inc.

Indiana Michigan Power

Indiana Natural Gas Corp.

Indianapolis Power & Light Company

Midwest Natural Gas Corp.

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South Eastern Indiana Natural Gas Co., Inc.

Sycamore Gas Co.

Vectren Energy Delivery of Indiana, Inc.

THE VOICE FOR INDIANA ENERGY

INDIANA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

DEC 30 2011

OFFICIAL COMMENT

OFFICE OF WATER QUALITY

December 30, 2011

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

Re: LSA Document #08-764 (Antidegradation)

Dear Ms. Stevens,

Attached, please find comments submitted by the Indiana Utility Group (IUG) regarding the above named matter. I will forward you an electronic version of our file stamped comments as well.

Thank you for your assistance. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,



Stan Pinegar
On behalf of the Indiana Utility Group

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December 30, 2011

MaryAnn Stevens
Rules Development Branch
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Indiana Department of Environmental Management
100 North Senate Avenue
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Indianapolis, IN 46204-2251

Re: IDEM Antidegradation Standards and Implementation Procedures Proposed Rule (LSA Document #08-764) as Publicly Noticed on December 9, 2011

Dear Ms. Stevens:

I offer these comments on behalf of the Indiana Utility Group with respect to the Proposed Rule for Antidegradation Standards and Implementation Procedures as preliminary adopted by the Water Pollution Control Board on September 14, 2011 ("Proposed Antidegradation Rule" or, simply, "Proposed Rule") and publicly noticed on December 9, 2011 ("3rd Notice"). The IUG's members include the 14 electric and gas utility members of the Indiana Energy Association as well as Dominion State Line Energy, Indiana Kentucky Electric Corporation, Wabash Valley Power, and Hoosier Energy REC, Inc. The IUG appreciates the opportunity to participate in the development of the rulemaking for Antidegradation Standards and Implementation Procedures in Indiana. It is critical in this time of transition for the electric power industry that IDEM develop antidegradation standards and implementation procedures that are (i) reasonable in balancing protection of water quality and promotion of economic development opportunity, (ii) clear in their meaning and operation, and (iii) not more restrictive than other USEPA Region V states.

The draft of the Antidegradation Standards and Implementation Procedures, as proposed by IDEM on May 9, 2011 and revised in the September 14, 2011 Proposed Rule reflecting interim recommendations of Board Members Gary Powdrill and David Wagner, contains welcomed clarifications, such as those concerning "threatened and endangered species", "available loading capacity," and "used loading capacity." The December 9, 2011 draft of the rule is an example of the benefit of receiving input from others in an effort to generate a well-defined Indiana Antidegradation Program. The IUG continues to urge additional refinement of the rule as the administrative rulemaking process proceeds. IUG has participated through oral and written comments and again welcomes the opportunity to provide additional written comments. IUG believes that further improvements to the proposed rule must be made during the next

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phase of the rulemaking to achieve the appropriate legal thresholds required for implementation. The IUG will continue to participate in this review process and highlights our recommended changes as follows.

IUG SUMMARY COMMENTS TO IDEM RESPONSE TO COMMENTS

IUG appreciates the time and effort that is committed to responding to comments in writing as has been done by IDEM. On page 84 of the December 9, 2011 proposal there is a specific response to IUG comments. To follow-up on those responses, we offer the following brief statements of IUG's continuing concern and direct the agency to the more comprehensive comments contained in this letter:

- When to start antidegradation review? IDEM offered that to comply with the Clean Water Act the antidegradation procedures must apply to all waters of the state. IUG would offer in reply that by having as a trigger the §402 permitting program designed to protect all waters of the state IDEM should be convinced the antidegradation program is comprehensive.
- Which discharges? IDEM stated that it believes that the basic elements of the antidegradation implementation as laid out in the rule are workable for both NPDES discharges and other actions that impact water quality – it is not necessary to address them separately. IUG responds by agreeing that the implementation procedures do not necessarily have to explain all details, but there may well be significant differences in how some aspects of the implementation procedures will or should apply to NPDES discharges versus other actions with water quality impacts. It is important for the regulated community to have enough notice of the scope of the program and its proposed operation to understand how the agency intends to implement in major contexts and how that will impact the obligations under existing law.
- Narrative criteria: How to say narrative and mean numerical? IDEM believes it is appropriate to include narrative criteria in the definition of regulated pollutant because there are pollutants that do not currently have a numeric water quality standard that merit regulatory review, but in its response to comments, the agency defined criterion or criteria as “a definitive numeric value.” IDEM recognizes that narrative water quality criteria cannot be used to establish a de minimis lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, in practice, for NPDES permits, the narrative criteria of Indiana's water quality standards are protected through the establishment of numeric effluent limits. These numeric limits are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation system. IUG responds by stating that the de minimis concept is a an unnecessary complication to the rule as evidenced by the tortured treatment of narrative criteria.

- Toxic or not? IDEM believes the definition of toxic substance is appropriate. IUG continues to urge a definition that has meaning and strongly objects to the language of that which "are or may become toxic." U.S. EPA has a defined list based upon a balance of factors that result in a definitive determination of a toxic substance to include: "toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms." CWA Section 307(a)(1). IDEM has yet to offer a rational or scientific basis as to why EPA's list is not definitive or why IDEM cannot engage in the rulemaking process to create a list of its own if needed.
- Are social or economic needs of other regions important? IDEM comments that the language of the statute suggests that "Inclusion by the applicant of additional factors that may enhance the social or economic importance associated with the proposed discharge, such as an approval that recognizes social or economic importance and is given to the applicant by: (i) a legislative body; or (ii) other governmental officials" should satisfy IUG that its members may assert a regional economic impact if it chose to do so. IUG responds by suggesting that, since IDEM recognizes that regional impacts can be considered, then the rule should expressly state this, especially given that this factor is likely to arise with some frequency.
- Antidegradation Demonstrations vs. Temperature Variance Demonstrations: Which is Most Comprehensive and Protective? IDEM acknowledged in the response to comments that "316(a) variances should not be subject to antidegradation review"; however, the draft rule still excludes such variances from waters designated as ONRWs. IDEM then states that the antidegradation standard is consistent with the federal regulation. IUG responds by referring IDEM to the history of 316(a) as set forth in previous written comment and in the literature.

IUG COMPREHENSIVE COMMENTS

1. THE SCOPE OF APPLICABILITY FOR THE PROPOSED RULE'S ANTIDEGRADATION IMPLEMENTATION PROCEDURES IS OVERLY BROAD

Indiana's proposed implementation procedures do not limit antidegradation review to only actions requiring a new or modified NPDES permit subject to section 402 (NPDES) of the Clean Water Act. Instead, Section 1(b) of proposed 327 IAC 2-1.3 would apply the implementation procedures to any proposed deliberate activity subject to the Clean Water Act that would result in a

new or increased loading of a regulated pollutant. However, the actual implementation procedures of Sections 4 and 5 of the Proposed Rule appear to be almost entirely based on the context of an NPDES discharger. Therefore, not only is the scope of applicability of the proposed implementation procedures vague, leaving open to question which activities would be subject to antidegradation review, but the Proposed Rule lacks meaningful implementation procedures for activities apart from those subject to NPDES permit requirements.

IUG urges that the scope of applicability for the proposed antidegradation implementation procedures be stated at this time in terms of "any new or increased loading of a regulated pollutant to surface waters of the state from an activity requiring issuance of a new or modified NPDES permit that will result in a significant lowering of water quality."

A review of other states' programs accepted by USEPA confirms that the agency's regulations do not mandate that antideg implementation be applied to any activity with water quality impacts, but rather allows for sufficient flexibility for states to base such a trigger on the need for a new or increased permit limit that contributes to a lowering of water quality. The Water Quality Standards Handbook (2d Ed., 1994) (the "Handbook") offers the following statement about when Tier 2 antidegradation review is required:

The Antidegradation review requirements of [40 C.F.R. § 131.2(a)(2)] are triggered by any action that would result in the lowering of water quality in a high-quality water. Such activities as new discharges or expansion of existing facilities would presumably lower water quality and would not be permissible unless the State conducts a review consistent with [the regulations]. In addition, no permit may be issued, without an Antidegradation review to a discharger to high-quality waters with effluent limits greater than actual current loadings if such loadings will cause a lowering of water quality.

Thus USEPA guidance suggests it is appropriate to tie antidegradation review to permit issuance and/or modification. Many states use a trigger based on NPDES permitting; including:

• Maryland: "general. An applicant for proposed amendments to county plans or discharge permits for discharge to Tier II waters that will result in a new, or an increased, permitted annual discharge of pollutants and a potential impact to water quality..." COMAR 26.08.02.04-1(B).

- Mississippi: *"A report regarding compliance with the antidegradation policy shall be conducted for all new or expanding wastewater discharges into Mississippi surface waters that require an NPDES permit. NPDES Permit reissuances will not be subject to the report procedures provided there are no proposed changes to the facility's effluent which would result in increased in pollutant loadings..."* Mississippi's implementation procedures pp. 4-5.

Similarly, other states in USEPA Region 5 tie applicability of the antidegradation review process to permitting under the 402 program of the Clean Water Act. See, for example:

- Illinois: *"A proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit. . . ."* 302.105(c)(2).

If IDEM bases its antidegradation program on any lowering of water quality beyond *de minimis* levels and fails to tie its review to the NPDES permitting context arising under Section 402 of the Clean Water Act, its program will become unduly difficult to implement both from a purely substantive numerical analysis and from a cost perspective, all with no clear defined environmental benefit. As proposed this rule is not at all user friendly and will require very skilled technical expertise to evaluate the *de minimis* formula. It is suggested that IDEM modify Section 1(b) of the Proposed Rule to specifically tie the "trigger" for the antidegradation program review to permitting requirements under section 402 of the Clean Water Act as follows:

(b) The antidegradation implementation procedures established in sections 4 through 7 of this rule apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state from an deliberate activity requiring permitting under section 402 of the Clean Water Act that will result in a significant lowering of water quality.

This modification to the proposed rule will provide clarity and specific guidance as to when an antidegradation review is required and what the antidegradation review will entail.

2. THE TERM "REGULATED POLLUTANT" CONTINUES TO LEAVE UNANSWERED THE QUESTION AS TO HOW NARRATIVE CRITERIA WILL BE APPLIED.

The term "regulated pollutant," continues to leave unanswered the question as to how narrative criteria will be applied. This uncertainty represents a number of legal problems. The legal burden of the agency to provide a rule that is neither arbitrary nor capricious is a significant one. The IUG suggested that the rule provide that a regulated pollutant be any numerically expressed parameter for which water quality criteria have been adopted. The agency has responded that U.S. EPA and surrounding states have included narrative criteria and therefore so should Indiana. IUG supports such inclusion, but asserts that it is entirely unreasonable for the agency to not qualify the rule such that it will apply only to those narrative criteria for which a numeric value has been developed to represent its expression or implementation. This will allow objective implementation of such criteria in this context, including implementation of the concept of *de minimis* lowering of water quality. This issue is so germane to the entire implementation procedures it is too important an issue to be left unstated for subsequent treatment only in guidance.

In addition to the main concern about the manner in which a narrative criterion may be the basis of a "regulated pollutant", the proposed definition contains an organizational awkwardness in which criteria and pollutants are lumped together inappropriately.

IUG urges that the definition of "regulated pollutant" be revised to read:

(44) "Regulated pollutant" means any:

(A) **any parameter, substance, or other constituent or characteristic** of a pollutant, as defined in subdivision (39):

(i) for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 or 327 IAC 2-1.5;

~~(AA) including (AA) narrative and numeric criteria;~~
and

~~(BB) **excluding biological criteria**; ~~nutrients,~~
specifically phosphorus and nitrogen; and~~

(ii) **including nutrients, specifically phosphorus and nitrogen; and**

(iii) excluding:

~~(AA) biological criteria~~ **pH; and**

~~(BB) **dissolved oxygen**~~ ~~pH; and~~

~~(CC) dissolved oxygen; and~~

(B) **any other parameter, substance, or other constituent or characteristic** of a pollutant, as defined in subdivision (39), that may be limited in an NPDES permit as a result of, but not limited to:

(i) best professional judgment;

(ii) new source performance standards;

(iii) best conventional pollutant control technology;

(iv) best available technology economically achievable; or

(v) best practicable control technology currently available;

for the appropriate categorical guidelines of 40 CFR 400 to 40 CFR 471;

(C) regardless of paragraph (A) of this definition, a "regulated pollutant" may not include or be based on a narrative water quality criterion unless a numeric value subject to reproducible, objective measurement has been established, through rulemaking, for a parameter, substance or other constituent or characteristic of a pollutant to express or implement the narrative criterion.

IUG applauds the removal of "pollutant of concern" in this proposed rule.

3. THE RULE CONTINUES TO LEAVE THE DEFINITION FOR "TOXIC SUBSTANCES" VAGUELY DESCRIBED AS SUBSTANCES THAT "ARE OR MAY BECOME HARMFUL."

In addition, the Proposed Rule continues to vaguely define the term "toxic substances" as "substances that are or may become harmful." IDEM explains in its response to comments that it must leave the definition vague on the chance that it would not have time to engage in a rulemaking effort to add a toxic substance to the regulatory list. The IUG respectfully proposes that IDEM's rationale is erroneous for several reasons.

(1). Toxicity is defined by scientific evidence and ultimate administrative rulemaking.

(2) If at a later date a substance is deemed through scientific evidence and rulemaking to be "toxic" then its addition to the antidegradation implementation procedures will be appropriate and not before.

(3) It is unconstitutional to create a regulatory concept so vague as to leave the the water quality standard rules ill-defined by failing to implement the prescribed procedures for determining numeric "Tier I" and "Tier II" values to identify toxic characteristics of substances.

IUG proposes that the definition in the antidegradation proposal be narrowed to "substances that are harmful".

4. THE ECONOMIC ANALYSIS PROVIDED BY THE PROPOSED RULE NEEDS TO TAKE INTO ACCOUNT REGIONAL ECONOMIC IMPACTS THAT MAY OCCUR FROM ACTIVITIES SUBJECT TO ANTIDEGRADATION REVIEW.

In previous comments, the IUG has urged refinements to the rule to recognize the reasonable necessity of an economic analysis that takes into

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account the regional nature of the economic impacts that may result from projects that trigger applicability of this rule . This is important to the electric utility industry as power plants located in one locality regularly may benefit those living in a more distant locality. IUG continues to press the importance of addressing this issue in the rule as follows: with the addition of a new factor (O) be included in Section 5(g)(5) of the proposed rule:

(O) Regional or statewide social or economic impacts of the activity associated with the proposed discharge.

5. 316(A) VARIANCES SHOULD NEVER BE SUBJECT TO ANTIDEGRADATION REVIEW

While IDEM acknowledged in its response to comments that, "316(a) variances should not be subject to antidegradation review," it still excludes such variances from waters designated as ONRWs. IDEM gives such variances, which are allowed by section 316(a) of the Clean Water Act, when a power company can "assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the thermal discharge is made." If 316(a) criteria were fully met, the applicable CWA protections would be achieved, which include protecting the existing uses. The statutory scheme and legislative history indicate that limitations developed under section 316 take precedence over other requirements of the Act and should therefore be exempt from antidegradation review.

In view of the foregoing points, IUG continues to urge that the exception for ONRWs be deleted from the general provision of Section 3(e) of the Proposed Rule that a determination approving alternative thermal effluent limits under Section 316(a) shall be deemed to be consistent with the rule's antidegradation standards.

6. 10% OF AVAILABLE LOADING CAPACITY

IUG welcomes the clarification provided by the agency that "the available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant."

7. THE DEFINITION OF "ENDANGERED AND THREATENED SPECIES"

IUG applauds the revision and clarification as to "endangered and threatened species." The rule should, however, make it clear in section 327 IAC 2-1.3-6(d)(3) that the state listed endangered and threatened species include only such lists that have been subject to public notice and comment.

8. THE DEFINITION OF "WASTEWATER"

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The definition of "wastewater" contained in the Proposed Rule at Section 2(57) is a specialized definition associated with septage haulers formerly codified in statute at IC 13-11-2-256 (repealed by P.L. 159-2011, SEC. 49) that is inappropriate for general usage in the Proposed Rule. The IUG recommends that this definition be deleted from the Proposed Rule.

IUG recognizes the efforts to improve this rule and greatly appreciates the work committed to this important rulemaking. Indiana needs to have an antidegradation implementation program and we support that effort, provided the resulting program is technically correct, legally defensible, and places the state in a leadership role regarding concurrent consideration of economic growth and environmental stewardship.

IUG has submitted detailed written and oral comments it urges the agency to consider. As the formal rulemaking process continues, IUG will continue to work to provide meaningful comments to the agency's important efforts. IUG appreciates this additional opportunity to provide clarification and comment at this time.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stan Pinegar", with a stylized, cursive script.

Stan Pinegar
On behalf of the
Indiana Utility Group